RAJESWARI THEDSHANAMURTHY v. KIN NAM REALTY DEVELOPMENT SDN. BHD.

[O.C.J. (Wan Hamzah J.) April 6, 1981]

[Kuala Lumpur – Civil Suit No. 3043 of 1978]

Contract – Contract for sale of land – Booking application signed – Defendant not called upon to execute sale and purchase agreements – Whether there was a binding contract – Breach of contract – Plea of frustration.

In this case the plaintiff had paid to the defendant booking fees for the purchase of two houses to be constructed by the defendant and the parties had signed a booking application which contained the terms and conditions of booking. The defendant did not call upon the plaintiff to execute sale and purchase agreements and the houses had not in fact been erected. The plaintiff brought an action for breach of contract. The defence was that there was no binding contract between the parties and if there was such contract, it had been frustrated.

Held: (1) there was a binding contract between the defendant and the plaintiff which had been reduced to writing in the form of the booking application and which both parties have signed, in which one of the undertakings on the part of the defendant was that it should get its solicitors to prepare the sale and purchase agreement, which undertaking the defendant was bound to perform;

(2) on the facts, it was clear that the defendant could sell the sublots agreed to the plaintiff, as they had not been required to be reserved for bumiputra and therefore the contract was not frustrated;

(3) in the circumstances of this case damages was the appropriate and adequate remedy.

CIVIL SUIT.

Miss G.N. Das for the plaintiff.
Miss Heng for the defendant.

Cur. Adv. Vult.

Wan Hamzah J.: The Plaintiff by Specially Indorsed Writ sues the Defendant for breach of agreements and applies for leave to enter final judgment.

On March 15, 1973 the Plaintiff paid to the Defendant $1,000 booking fees for the purchase of two houses to be constructed by the Defendant one each on two pieces of land called sublot No. 5 and sublot No. 7 respectively, at Jalan Kubang Buaya, Kuantan. In respect of each sublot the Plaintiff and the Defendant signed a document with heading "Booking Application", in which are stated the type of the house to be constructed being terrace single storey, and its price being $16,950 and its area being 22 feet by 80 feet. In the document the Defendant is called the developer, and the Plaintiff is referred to as applicant. It contains a statement to the effect that the Defendant accepted the application, and it also contains the following statement under heading "Terms and Conditions of Booking":–

"The parties hereto agree as follows:–

1. The applicant shall be registered as the purchaser.
2. The applicant shall not transfer, sell or assign the said Lot to any other person without the prior consent of the Developer.
3. The applicant is deemed to have inspected and accepted the proposed plan of the House and the specifications and the siting of the said Lot and approved the printed Sale and Purchase Agreement setting out the terms and conditions of sale.
4. The applicant shall when called upon by the Developer or their Solicitors within 14 days thereof execute the Sale and Purchase Agreement to be prepared by the said Solicitors AND IT IS HEREBY EXPRESSLY AGREED that in the event of the applicant failing to execute the agreement as aforesaid, the booking fee paid to the Developer shall be forfeited as agreed liquidated damages and this booking shall be rendered null and void.
5. All legal fees and stamp duties, incidental to the preparation of the Sale and Purchase Agreement and the subsequent transfer of the said Lot shall be borne and paid by the applicant.
6. It is expressly understood that this booking is accepted subject to contract being executed in good time.
7. The said building is subject to approval by local authority or authorities."

The Defendant has not called upon the Plaintiff to execute Sale and Purchase Agreements. Up to the beginning of 1975 the houses had not been constructed, and on March 17, 1975 the Plaintiff wrote to the Defendant's solicitors to enquire whether the houses would be built. She received no reply. Therefore she now sues the Defendant for breach of agreements. The Defendant in its Statement of Defence pleads –

(a) that there is no binding contract between it and the Plaintiff whereby it is bound to construct and sell houses to the Plaintiff; and

(b) that even if there are such contracts, they have been frustrated.

As to contention (a), it was submitted on behalf of the Defendant that the parties have not fixed the term as to the method of payment and other terms for the sale and purchase agreements and for that reason and for the reason that sale and purchase agreements have not been signed by the parties there is no binding contract between it and the Plaintiff. In fact the method

of payment is fixed by the law in Rule 12(1) (e) and Schedule C of the Housing Developers (Control and Licensing) Rules, 1970, and the parties are bound to adopt that method. I hold that in respect of each sublot there is a binding contract between the Defendant and the Plaintiff which has been reduced into writing in the form of the document to which I have referred earlier and which both parties have signed, and in which one of the undertakings on the part of the Defendant is that it should get its solicitors to prepare sale and purchase agreement, which undertaking the Defendant is bound to perform.

As to contention (b) it is stated in the Statement of Defence that for approval of the conversion and subdivision of the land for the construction of the houses, the Government has imposed a condition that seven of the terrace houses and three of the bungalow houses to be built should be reserved for the State Development Authority as representative of bumiputra buyers. It is further stated that there is not a single bumiputra among all the 32 intending purchasers including the Plaintiff who made bookings. It is contended that for this reason the contract with the Plaintiff (if there is such a contract) has been frustrated by the condition imposed by the Government. I do not see how this contention can be upheld. It is not stated by the Defendant how many houses were approved by the Government for construction. Besides, it is not a condition imposed by the Government that sublot No. 5 and sublot No. 7 be reserved for the State Development Authority. It is still possible for the Defendant to sell sublot No. 5 and sublot No. 7 to the Plaintiff. I hold that in respect of each sublot there is a contract which has not been frustrated.

This is not a case where the parties had negotiated the terms for sale and purchase agreement and failed to agree on the terms. This is a case where the parties have reached agreement on certain terms and have also agreed to execute a written sale and purchase agreement. This means that it is still open to the parties to negotiate further terms which they have not considered and to include in the written agreement further agreed terms. It is implied that either party undertakes to negotiate any further terms not already agreed upon, if there is any such further terms not already agreed upon. It is submitted on behalf of the Defendant that there is no binding contract because the parties have not finalised the terms to be included in the sale and purchase agreement. The fact is that the Defendant had refused even to negotiate the terms to be included in the sale and purchase agreement, and refused to execute a sale and purchase agreement, and by so refusing it has breached its undertaking under the contract. The Defendant has breached the contract in that it has failed to get a sale and purchase agreement prepared for execution, and it has failed to pursue the matter until completion of sale and purchase of the two houses which it has undertaken to construct and sell to the Plaintiff.

The Plaintiff asks for damages in lieu of or in addition to specific performance. In my opinion, under the circumstances of this case damages is the appropriate and adequate remedy. The amount of damages should be measured by the difference between the current market price of a house in the same locality, of the kind which the Defendant has failed to sell and deliver to the Plaintiff, and the price at which the Defendant had agreed to sell to the Plaintiff, plus the amount of booking fee paid by the Plaintiff. Therefore in respect of the two houses the damages should be $57,100.

Accordingly I give judgment for the Plaintiff in the sum of $57,100 and costs.

Judgment for the plaintiff.

Solicitors: *Hisham, Sobri & Kadir; K. Y. Foo & Co.*

CHIANG BOON FATT v. LEMBAGA KEMAJUAN NEGERI PAHANG & ANOR. CHIN YEE THOW v. LEMBAGA KEMAJUAN NEGERI PAHANG & ANOR.

[O.C.J. (George J.) December 15, 1981]
[Kuantan – Civil Suit Nos. 95 & 131 of 1976]

Damages – Fatal accident – Young man about to enter university – Award of M$15,000 for loss of dependency and M$4,000 for loss of expectation of life

The two actions in this case arose out of the same accident involving a motor van belonging to the first defendant in each suit and driven by the second defendant in each suit and motorcycle ridden by one Chin Yew Fan and Chiang Boon Fatt who was the pillon rider. As a result of the accident both the pillon rider and the rider of the motorcycle suffered personal injuries. Civil Suit No. 131 of 1976 was brought by Chin Yee Thow as administrator of the estate of the deceased Chin Yew Fan. The court found the driver of the motor car solely to blame for the accident. The defendants appealed "against such part only of the said decision as decides that the defendants to pay to the plaintiff in Civil Suit No. 131/1976 damages in the